

IN THE  
SUPREME COURT  
FOR THE STATE OF FLORIDA

CASE NO. 73,350  
DCA-1 BS-398

FILED

SID A. VINTG

DEC 29 1983

BY *m*  
Clerk of Court

WARREN FINANCE, INC., a Florida corporation,

Petitioner,

vs.

BARNETT BANK OF JACKSONVILLE, N.A.,  
a national banking association,

Respondent.

APPEAL FROM THE DISTRICT COURT OF APPEALS  
FOR THE FIRST DISTRICT, STATE OF FLORIDA

INITIAL BRIEF

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STATEMENT OF THE CASE

This is an appeal from an opinion of the First District Court of Appeals (the "DCA") overturning a summary judgment entered in favor of the Petitioner, Warren Finance, Inc. ("Warren Finance"). The trial court ruled that Warren Finance was entitled to recover from the Respondent, Barnett Bank of Jacksonville, N.A. ("Barnett"), the principal amount of \$221,443.35, which constitutes the total amount of three cashier's checks negotiated to Warren Finance on which Barnett had stopped payment (the "Cashier's Checks").

Warren Finance filed an action on October 3, 1986 in the Circuit Court of the Fourth Judicial Circuit in and for Duval County, Florida against Barnett, seeking recovery of the amount of the Cashier's Checks on which Barnett had stopped payment after the purchaser of the Cashier's Checks, Redan Engineering, Inc. ("Redan"), had negotiated them to Warren Finance. [R.1-7]<sup>1</sup> A Third Party Complaint was filed in the same action on February 24, 1987 by Barnett against Charles W. Grant, as Trustee (the "Trustee") for the estate of Redan, seeking recovery from the Trustee in the event that Warren Finance recovered from Barnett. [R.43-60] On March 16, 1987, the Trustee filed a Fourth Party Complaint in this action against Warren Finance which included various counts in tort and contract. [R.67-70]

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1 All references to the bound record on appeal are denoted with the letter "R."

The trial court on March 16, 1987 ruled on Warren Finance's Motion for Summary Judgment, ordering that Warren Finance should be compensated in the amount of the Cashier's Checks on which Barnett had stopped payment. [R.71] On appeal, the DCA reversed the Summary Final Judgment entered by the trial court in favor of Warren Finance. In a case of first impression in this state, the DCA ruled that while a bank may not countermand a cashier's check in the hands of a payee, it may properly refuse to pay a cashier's check upon the request of a payee or intervening endorsee when the check is presented for payment by an endorsee who is not a holder in due course.

On October 28, 1988, the DCA denied Warren Finance's Motion for Rehearing but certified the following question as one of great public importance:

"May the issuing bank assert the defenses of a payee or endorsee against the right of a subsequent endorsee to receive payment on a cashier's check?"

#### STATEMENT OF FACTS

In August, 1986, Blossam Contractors, Inc. ("Blossam") and T. Butler Company ("Butler"), paid Redan a total of \$221,443.35 for construction work performed by Redan for Blossam and Butler. [12/1/86 J.L. Odom 35, 36]<sup>1</sup> Redan had previously assigned to Warren Finance all of Redan's rights to receive such payments as security for the repayment of loans made by Warren Finance to

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1 Depositions are referred to by the deponent's last name (and initials if necessary) for purposes of citation to the record on appeal.



Redan, which loans had financed Redan's construction work for Blossam and Butler. [12/1/86 J.L. Odom 25, 26] In accordance with this assignment, Redan's president, John Odom, and its treasurer, Janet Odom, presented the Blossam and Butler checks to Warren Finance. [Warren 501

In order to receive immediate credit and avoid problems with Redan's recent history of bouncing checks, Warren Finance requested cashier's checks from Redan in lieu of the Blossam and Butler checks. [Warren 52, 57] The parties went together to Barnett, the bank on which the Blossam and Butler checks were drawn. [Warren 56] There was no dispute as to the validity of the Blossam and Butler checks between Barnett and Redan or between Barnett and Warren Finance. [Glaze 21] At Barnett, the Blossam and Butler checks were exchanged for three cashier's checks in the aggregate amount of \$221,443.35 made payable to Redan. [Warren 57-60] Janet Odom then endorsed the Cashier's Checks in blank and delivered them to Ellis Warren, president of Warren Finance. [Warren 61, 62]

Later the same day, a dispute arose between Redan and Warren Finance [Warren 64], and Redan asked Blossam to call Barnett and request that payment be stopped on the Cashier's Checks. [12/1/86 J.L. Odom 64; Rennhack 61] Subsequently, at Blossam's request, Barnett stopped payment on the Cashier's Checks (including the Cashier's Check that had been issued in exchange for the check drawn by Butler.) [Rennhack 13] The next

business day, Barnett issued replacement checks to Redan, without obtaining an indemnity agreement from Redan, contrary to the requirements set forth in Barnett's operating procedures manual.

[Hill 21; Glaze 161

Warren Finance brought this action against Barnett on October 3, 1986, seeking to recover the amount of the Cashier's Checks. [R. 1-71 On October 17, 1986, an involuntary petition for bankruptcy was filed against Redan under Chapter 7 of the Bankruptcy Code.

#### SUMMARY OF ARGUMENT

Under the Uniform Commercial Code, a cashier's check is not subject to countermand (except in circumstances involving fraud or other failure of consideration as to the issuing bank, which are not at issue in the instant case). Because a cashier's check is accepted by the issuing bank at the time the bank draws the check on its own funds, a check can only be countermanded prior to acceptance. By simultaneously issuing and accepting the Cashier's Checks purchased by Redan, Barnett agreed to pay Warren Finance as the holder of the Cashier's Checks when the checks were presented for payment.

The Uniform Commercial Code provisions which prevent the issuing bank from stopping payment on its own cashier's check apply regardless of whether the check is held by the payee, an endorsee or a subsequent endorsee. There is no legal basis for the DCA's creation of a judicial exception to permit the issuing

bank to stop payment on a cashier's check when negotiated by the payee to an endorsee who is not a holder in due course. The only authority cited by the Court was a 20 year-old decision of an Ohio trial court which in turn relied on pre-Code decisions. Florida's appellate courts should not be the first and only in the U.S. to create a judicial exception under the Code for cashier's checks in the hands of endorsees.

Under the Uniform Commercial Code, the duty of a bank to pay the holder of a cashier's check does not depend on the status of the holder, whether a payee or endorsee, as a holder in due course. Because a cashier's check is accepted for payment upon issuance, the status of the holder as an endorsee or a holder in due course is irrelevant. Accordingly, regardless of whether it was a holder or a holder in due course, Warren Finance had the right to receive payment of the Cashier's Checks upon presentation.

The rationale for the DCA's decision permitting stop payment orders with respect to endorsees as opposed to payees is that a cashier's check becomes entangled in collateral transactions once negotiated by endorsement to parties other than the payee. This rationale does not apply to Warren Finance, which specifically requested the Cashier's Checks in lieu of ordinary checks precisely because of the Uniform Commercial Code provisions making cashier's checks the functional equivalent of currency.

Similarly, the DCA's rationale does not apply to the general commercial usage of cashier's checks, which are frequently negotiated to endorsees as a method of providing immediacy and finality of payment. Countless business transactions are closed through the use of cashier's checks made payable to the buyer, who has a means of maintaining control over the funds represented by the check until satisfied that all aspects of the transaction have been closed to his satisfaction. Once all conditions have been fulfilled, the buyer endorses the check to the seller, who obtains immediacy and finality of payment as if he had received cash.

Cashier's checks are used in this manner (a) to avoid the time and expense of legal challenges to the endorsee's status as a holder in due course and (b) to avoid the risk of bankruptcy of the purchaser or endorser during the interval between the negotiation of the check and its presentation to the drawee bank for payment. The importance of cashier's checks in commerce is that the holder, regardless of whether he is a payee or endorsee, need not be concerned about whether the check will be dishonored when presented for payment. If the DCA's decision is upheld, this reliance on cashier's checks in the State of Florida will be effectively foreclosed, and cashier's checks negotiated to endorsees will no longer have any utility vis-a-vis ordinary checks.

Treating cashier's checks as the functional equivalent of currency will further the policy of negotiability underlying the Uniform Commercial Code. All appellate courts interpreting the Uniform Commercial Code have disallowed defenses based on the claim that the holder of a cashier's check is not a holder in due course. If the DCA's decision is upheld, Florida's appellate courts will be the only appellate courts in the nation to hold that cashier's checks are subject to countermand for reasons other than fraud upon the issuing bank or failure of consideration as to the bank itself.

The DCA has ruled that Warren Finance should suffer the loss of the value of the Cashier's Checks as a result of Barnett's negligence in failing either to obtain an indemnity from Redan or to interplead the funds claimed by both Warren Finance and Redan. To impose this loss on Warren Finance will have the effect in Florida of depriving cashier's checks in the hands of endorsees of the essential characteristics which make them useful.

For these reasons, the DCA's decision should be overturned and the summary judgment entered in favor of Warren Finance by the trial court should be reinstated.

#### **ARGUMENT**

- I. A BANK CANNOT STOP PAYMENT ON ITS OWN CASHIER'S CHECK BECAUSE UNDER THE UNIFORM COMMERCIAL CODE, THE ISSUANCE OF A CASHIER'S CHECK BY THE BANK CONSTITUTES ACCEPTANCE, AND A CHECK CAN ONLY BE COUNTERMANDED PRIOR TO ACCEPTANCE BY THE BANK.

a A bank's liability on checks written on the bank is governed by Article 3 of the Uniform Commercial Code (adopted in Florida as Chapter 673, Florida Statutes). Under the Uniform Commercial Code, a bank on which a check is drawn (the drawee) is not liable on a check written or drawn on that bank until the bank "accepts" the check:

A check or other draft does not of itself operate as an assignment of any funds in the hands of the drawee [bank] available for its payment, and the drawee is not liable on the instrument until he accepts it.

UCC §3-409(1), §673.409(1), Fla. Stat. (1987) (emphasis added).

Acceptance by the bank is defined in the Uniform Commercial Code as follows:

a Acceptance is the drawee's [bank's] signed engagement to honor the draft as presented. It must be written on the draft and may consist of his signature alone. It becomes operative when completed by delivery or notification.

UCC §3-410(1), §673.410(1), Fla. Stat. (1987).

a Ordinarily, a drawee bank accepts a check in normal clearing procedures by endorsing the check with language similar to "Pay Any Bank." However, because a bank is both the drawer (maker) and the drawee of a cashier's check, the signature of the bank's officer on the cashier's check constitutes acceptance, which becomes operative when the cashier's check is delivered to the purchaser. State of Pennsylvania v. Curtiss National Bank of Miami Springs, Florida, 427 F.2d 395 (5th Cir. 1970) (construing

Section 673.410(1), Fla. Stat.). Thus, the bank's issuance of a cashier's check "by definition is also acceptance." Id. at 399.

The collection of items by a drawee (also called a payor bank) is governed by Article 4 of the Uniform Commercial Code (adopted in Florida as Chapter 674, Florida Statutes). The time by which a payor bank must receive a stop-order for such stop-order to be effective is provided for in Section 674.303, Florida Statutes, which reads as follows:

- (1) Any knowledge, notice or stop-order received by, legal process served upon or setoff exercised by a payor bank, whether or not effective under other rules of law to terminate, suspend or modify the bank's right or duty to pay an item or to charge its customer's account for the item, comes too late to so terminate, suspend or modify such right or duty if the knowledge, notice, stop-order or legal process is received or served and a reasonable time for the bank to act thereon expires or the setoff is exercised after the bank has done any of the following:

- (a) Accepted or certified the item;

.....

UCC §4-303(1)(a), §674.303 (1)(a), Fla. Stat. (1987) (emphasis added).

Unlike an ordinary third-party check, which is drawn on the bank by a third party and is subject to being countermanded during the interval between the writing of the check by the third party and acceptance of the check by the bank, a cashier's check is drawn by the bank itself on its own funds. Because the very

act of issuance of the check constitutes acceptance by the bank,  
there is no interval during which the check can be subject to a  
stop payment order.

Thus, in Curtiss, supra, the leading case on cashier's  
checks decided under Florida law, the Fifth Circuit held as  
follows:

[T]he Bank's issuance of the check, which  
b definition al acceptance,  
constituted an engagement by the Bank to  
honor the check as presented (see U.C.C.  
§3-410, Fla. Stat. §673.3-410)  
extinguishing the right of the bank or  
anyone else to countermand the check. See  
U.C.C. s4-403, Fla. Stat. §674.4-403 and  
Comment thereto.

Id. at 399 (emphasis added). The Curtiss court further  
emphasized as follows:

The cashier's check, purchased for adequate  
consideration, unlike an ordinary check,  
stands on its own foundation as an  
independent. unconditional and primary  
obligation of the Bank.

Id. at 400 (citation omitted) (emphasis added). In view of this  
equivalence between cash and cashier's checks created by the  
Uniform Commercial Code, the Curtiss court held that the  
defendant bank had wrongfully refused to honor a cashier's check  
issued by the bank.

Similarly, in In re Kimball, 16 B.R. 201 (Bankr. M.D. Fla.  
1981), it was held that under the Uniform Commercial Code as  
enacted in Florida, cash and cashier's checks are functional  
equivalents. The Kimball court considered whether a payment made



with a cashier's check, which was purchased and delivered before the ninety days preceding the filing of a bankruptcy petition but stamped "paid" by the payor bank within the ninety day preference period, constituted a voidable preference. The court found that the alleged preferential payment occurred upon delivery, stating as follows:

Considering the nature of a cashier's check, this Court is satisfied that there is no legally significant difference between currency and a cashier's check, therefore, it represents payment when delivered. While at first blush it may appear that the purchaser may stop payment by directing the issuing bank not to honor the cashier's check, just as the maker may stop payment on an ordinary check, this is not the case at all. On the contrary, it is established that under Fla. Stat. §§ 673.3-413, 673.3-410, 674.4-303 (U.C.C. §§ 3-413, 4-303), a cashier's check is accepted by the very act of issuance. It becomes a primary obligation of the issuing bank rather than the purchaser. and represents an absolute, irrevocable promise of the bank to honor same when Presented for collection. Neither the bank nor the purchaser have any authority to countermand the cashier's check after issuance. (Citations omitted.) Thus whether the debtor makes payment by currency or by delivery of a cashier's check to the creditor is without legal significance, and is merely a distinction without difference.

Id. at 203 (emphasis added).

The Uniform Commercial Code provisions cited above as enacted in other states have been uniformly construed by the courts to prevent a bank from stopping payment on its own cashier's check. In Florida and all other jurisdictions in which

Sections 3-409, 3-410 and 4-403 of the Uniform Commercial Code have been enacted, the courts have held that because the issuance of a cashier's check by definition constitutes acceptance, a cashier's check is not subject to countermand (except in the limited case, not applicable in the instant case, where the bank, whether because of fraud on the bank itself or other failure of consideration as to the bank, fails to receive consideration for the issuance of the check). E.g., National Newark & Essex Bank v. Giordano, 111 N.J. Super. 347, 268 A.2d 327, 329 (1970) ("In drawing the instrument the bank represents that as drawee it will honor the draft when presented"); Wertz v. Richardson Heights Bank and Trust, 495 S.W.2d 572, 574 (Tex. 1973) ("under the Code the bank's issuance of the [cashier's] check, which by definition is also acceptance, constituted an agreement by the bank to honor the check as presented"). See also, Swiss Credit Bank v. Virginia National Bank-Fairfax, 538 F.2d 587 (4th Cir. 1976) (a cashier's check is accepted in advance by the act of its issuance, and it cannot be dishonored by the issuing bank because of an indebtedness to it of one of its customers). Accord, Munson v. American National Bank and Trust Co., 484 F.2d 620 (7th Cir. 1973); Da Silva v. Sanders, 600 F. Supp. 1008 (D.D.C. 1984); Abilities, Inc. v. Citibank, N.A., 87 A.D.2d 831, 449 N.Y.S.2d 242 (N.Y. App. Div. 1982).

As a matter of law from the statutes and cases cited above, Barnett had no right or duty in the instant case to

dishonor the Cashier's Checks purchased by Redan and endorsed to Warren Finance. When Barnett's officer affixed her signature to the Cashier's Checks drawn on Barnett's funds, Barnett accepted the Cashier's Checks and agreed to pay the Cashier's Checks when presented. Therefore, any stop-order presented to Barnett after the issuance and simultaneous acceptance of the Cashier's Checks arrived too late to be effective to terminate Barnett's duty to honor the Cashier's Checks when presented for payment. The Cashier's Checks stood as independent, unconditional and primary obligations of Barnett.

11. THE UNIFORM COMMERCIAL CODE PROVISIONS WHICH PREVENT THE ISSUING BANK FROM STOPPING PAYMENT ON ITS OWN CASHIER'S CHECK ARE EQUALLY APPLICABLE REGARDLESS OF WHETHER THE CHECK IS HELD BY THE PAYEE, AN ENDORSEE OR A SUBSEQUENT ENDORSEE. FLORIDA SHOULD NOT BE THE SOLE STATE IN THE U.S. WHOSE APPELLATE COURTS HAVE CREATED A JUDICIAL EXCEPTION FOR CASHIER'S CHECKS HELD BY ENDORSEES FOR WHICH THERE IS NO LEGAL AUTHORITY UNDER THE CODE.

The Uniform Commercial Code provisions which prevent a bank from stopping payment on its own cashier's check apply a fortiori when the bank seeks to assert the defenses of a payee or endorsee against the right of a subsequent endorsee to receive payment on the check. Nevertheless, in reversing the trial court's entry of summary judgment in favor of Warren Finance, the DCA held that when circulated to subsequent endorsees, a cashier's check may be countermanded upon the payee's request if the subsequent endorsee is not a holder in due course.

The DCA acknowledged that under the Uniform Commercial Code provisions discussed above, a cashier's check is the functional equivalent of cash in the hands of the named payee and therefore may not be countermanded (except on the basis of a fraud upon the bank itself, which is not at issue in the instant case). However, in a case of first impression in this state, the DCA created a unique judicial exception from the Uniform Commercial Code provisions equating the issuance of a cashier's check to its acceptance for situations in which a cashier's check has been negotiated by the payee to one or more subsequent endorsees and the endorsee does not qualify as a holder in due course.

Unfortunately, however, no legal analysis under the Uniform Commercial Code was offered by the DCA to explain the basis for the creation of this judicial exception. The opinion did not attempt to reconcile its decision with the provisions of the Uniform Commercial Code outlined above which state that because the very act of issuance constitutes acceptance, by definition there can be no interval during which a cashier's check may be subject to a stop payment order. If the issuance of a cashier's check constitutes acceptance, thereby rendering a cashier's check equivalent to cash, how does the check suddenly lose its cash-like attributes when negotiated to an endorsee?

The only authority cited by the Court for its decision is an old opinion of a trial court in Ohio dating from 1965 which

relied in turn on cases that pre-date the enactment of the Uniform Commercial Code. Leo Syntax Auto Sales, Inc. v. Peoples Bank & Savings Company, 215 N.E.2d 68 (Tuscarawas Co. Court of Common Pleas 1965). **As** Justice Ervin pointed out in his opinion concurring in the certification of the issue in the instant case as a question of great public importance (but dissenting from the Court's reversal of the summary judgment entered in favor of Warren Finance), the Leo Syntax opinion cites no direct authority for distinguishing between a cashier's check in the hands of the named payee versus a cashier's check presented for payment by an endorsee of the payee. Slip op. at 7-8.

In Leo Syntax, the payee of a cashier's check purchased the check made payable to himself and endorsed it to the holder in payment of the purchase price of a car. When the payee discovered that the car was defective, he asked the bank to dishonor the check when presented. The Ohio court ruled that upon the payee's request a bank may refuse to honor a cashier's check when presented by a party who is not a holder in due course.

The Ohio court failed to analyze the Uniform Commercial Code provisions discussed above which define the issuance of a cashier's check as its acceptance. The only authority referred to by the court consisted of a 1958 decision of an Ohio appellate court, a 1935 decision of the Louisiana Supreme Court, a 1936 decision of the Delaware Supreme Court, and a 1924 decision of the New Jersey Supreme Court, all decided before the adoption of

the Code. Cross v. Exchange Bank Co., 168 N.E.2d 910 (Ohio Ct. App. 1958), Nielsen v. Planters Trust & Savings Bank of Opelousas, 164 So. 613 (La. 1935) Polotsky v. Artisans Sav. Bank, 188 A. 63 (Del. 1936), Sutter v. Security Trust Co., 126 A. 435 (N.J. 1924). None of these cases ~~explains why~~ a cashier's check should be treated like cash in the hands of a payee but should be stripped of its cash-like attributes in the hands of an endorsee.

Moreover, subsequent to Leo Syntax, a New York appellate case decided under the Code, Dziurak v. Chase Manhattan Bank, 58 A.D.2d 103, 396 N.Y.S.2d 414 (Sup. Ct. App. Div. 1977), aff'd 44 N.Y.2d 776, 377 N.E.2d 474 (1978), reached a result that is directly contrary to Leo Syntax and the DCA's opinion in the instant case. Dziurak involved the purchaser of an interest in a business who obtained a cashier's check made payable to himself as payee. The payee endorsed the check to the seller and then subsequently attempted to stop payment on the check. The New York appellate court, citing Section 3-410 of the Uniform Commercial Code (adopted in Florida as Section 673.410, Florida Statutes, quoted above), emphasized that "~~the statute makes no distinction between a cashier's check presented for payment by a payee or one presented by an endorsee of the payee.~~ 396 N.Y.S.2d at 417 (emphasis added). Under UCC Section 3-410, acceptance is the bank's signed engagement to honor the draft as presented.'" The New York court therefore held that the bank properly refused

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to countermand the cashier's check when presented for payment by the endorsee.

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Similarly, in State of Missouri ex rel. Chan Siew Lai v. Powell, 536 S.W.2d 14 (Mo. 1976), a cashier's check had been negotiated by the payee to a holder who sought to enforce payment of the check. The fact that the check was presented for payment by an endorsee rather than the payee failed to affect the court's decision that the bank was prohibited from countermanding the check.

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The Uniform Commercial Code makes no distinction between a cashier's check in the hands of a payee and a cashier's check in the hands of an endorsee. Neither have the courts, other than in Leo Syntax, an obscure decision of an Ohio trial court, which was rendered more than 20 years ago and relied on pre-Code precedent. Warren Finance respectfully submits that the DCA erred in ignoring the express language of the Uniform Commercial Code as adopted in Florida in favor of such dubious precedent. It appears that the Court strained to create a judicial exception for which there is virtually no legal authority in order to overturn the summary judgment entered below and remand the case for trial. If the DCA's decision is affirmed, Florida will be the only state in the U.S. to have sanctioned such an exception under the Code.

111. BECAUSE ISSUANCE OF A CASHIER'S CHECK CONSTITUTES ACCEPTANCE, IT IS IRRELEVANT WHETHER AN ENDORSEE OF A CASHIER'S CHECK IS A HOLDER IN DUE COURSE.

Despite the plain language of the Uniform Commercial Code and the vast body of case law under the Code holding that a cashier's check is accepted for payment upon issuance, the DCA ruled in the instant case that the issuing bank may assert the defenses of the payee of a cashier's check where the endorsee is not a holder in due course. A holder in due course is a holder of an instrument who takes it (a) for value, (b) in good faith, and (c) without notice of any defense against or claim to it on the part of any person. **§673.302**, Fla. Stat. (1987) (UCC **§3-302**). The Uniform Commercial Code provides that one who is not a holder in due course takes an instrument subject to various claims and defenses. **§673.306**, Fla. Stat. (1987) (UCC **§3-306**).

However, to apply these provisions to cashier's checks, as the DCA has done, runs expressly counter to the Uniform Commercial Code provisions discussed above making it by definition impossible to countermand a cashier's check. To require that an endorsee be a holder in due course also runs counter to an overwhelming body of case law construing such Code provisions to prohibit stopping payment on a cashier's check once it has been issued. See cases cited in Section I above. Under the Uniform Commercial Code, because there is no interval between the time of issuance and acceptance of a cashier's check, it is irrelevant whether or not the holder of the check is a holder in due course.



Thus, in State of Pennsylvania v. Curtiss National Bank of Miami Springs, Florida, supra at 399 n.1, for example, Florida's leading case on cashier's checks, it was assumed that the holder was not a holder in due course since no claim or factual determination of holder in due course status had been made at the trial court level. Nevertheless, the court held that because issuance constitutes acceptance, the holder of the cashier's check was entitled to payment thereon. See also National Newark & Essex Bank v. Giordano, supra (holder alleged to have delivered goods that were defective in exchange for payment by means of cashier's check).

Only in the context of the bank's assertion of personal defenses, whereby the bank itself is harmed in the issuance of cashier's checks, is the status of the holder of the checks as a holder in due course relevant. Thus, for example, it has been held that a bank may refuse to honor a check issued by it when the payee is not a holder in due course but "a party whose scheme to defraud the bank includes the issuance of the instrument." TPO, Incorporated v. Federal Deposit Insurance Corp., 487 F.2d 131, 137 (3d Cir. 1973). In the instant case, however, there has never been any allegation that Warren Finance engaged in a scheme to defraud Barnett. Barnett received three valid, undisputed checks, drawn on accounts maintained at Barnett by Blossam and Butler, as consideration for the issuance of the Cashier's Checks to Ređan.

Barnett, as the maker and acceptor of the Cashier's Checks, warranted that it would pay the instruments as they existed at the time of acceptance. Section 673.413, Florida Statutes (1987) (UCC §3-413), titled "Contract of Maker, Drawer and Acceptor," provides that "The maker or acceptor engages that he will pay the instrument according to its tenor at the time of his engagement...." Section 673.410 does not state that upon acceptance, the bank shall honor only those items presented by a holder in due course.

Warren Finance is undisputably a bona fide holder of the Cashier's Checks and had the absolute right to receive payment for the Cashier's Checks. Section 671.201 (20), Florida Statutes (1987) (UCC §1-201) defines a holder as "a person who is in possession of a document of title or an instrument...issued, or endorsed to him or his order or to bearer or in blank." Warren Finance gave value for the Cashier's Checks by accepting the Cashier's Checks as partial payment of the antecedent debt owed to Warren Finance by Redan. Redan properly endorsed the Cashier's Checks to Warren Finance, entitling Warren Finance to enforce payment of the checks. "The holder of an instrument whether or not he is the owner may transfer or negotiate it, and except as otherwise provided in Section 3-306 on payment or satisfaction, discharge it or enforce payment in his own name." §673.301, Fla. Stat. (1987) (UCC §3-301) (emphasis added).

Warren Finance, as a holder, was entitled to receive payment when it presented the Cashier's Checks for payment. Barnett has attempted throughout this case to obfuscate its compelling duty to pay the Cashier's Checks by raising the issue of whether or not Warren Finance was a holder in due course. But it is not necessary to determine whether or not Warren Finance was a holder in due course inasmuch as Barnett had a duty upon acceptance to pay the Cashier's Checks of which Warren Finance was the holder.

IV. THE DCA'S RATIONALE FOR PERMITTING A BANK TO STOP PAYMENT ON A CASHIER'S CHECK BASED ON THE DEFENSES OF A PAYEE WHEN THE CHECK IS IN THE HANDS OF AN ENDORSEE IS NOT BORNE OUT BY THE FACTS OF THE INSTANT CASE OR THE CUSTOMARY USAGE OF CASHIER'S CHECKS IN THE BUSINESS WORLD. CASHIER'S CHECKS NEGOTIATED TO ENDORSEES ARE RELIED UPON IN COUNTLESS COMMERCIAL TRANSACTIONS, AND WERE SO RELIED UPON BY WARREN FINANCE, TO AVOID THE RISK OF LITIGATING HOLDER IN DUE COURSE STATUS AND THE RISK OF BANKRUPTCY OF THE PURCHASER AND ENDORSER.

The policy basis for the DCA's holding that a bank may stop payment on a cashier's check when presented for payment by an endorsee who is not a holder in due course is that a cashier's check "becomes entangled in other transactions" once negotiated by endorsement to parties other than the payee. Slip op. at 6. The Court assumed that in such circumstances the parties "naturally place less reliance on a cashier's check as the equivalent to cash." *Id.* However, this reasoning does not apply either to the facts of the instant case or to the general commercial usage of cashier's checks.

The Cashier's Checks in the instant case were obtained by Redan, the payee, in exchange for ordinary checks made payable to Redan. Redan purchased the Cashier's Checks upon the demand of Warren Finance, which sought the assurance of immediate and final payment. Thus, the Cashier's Checks did not happen to be issued to Redan for some independent reason, with endorsement taking place only later. Contrary to the language in the opinion of the DCA, the Cashier's Checks were not "used to satisfy obligations unrelated to the original transaction for which the cashier's check[s] [were] obtained." Id. at 6-7. The checks did not become entangled in other transactions such that the parties would naturally place less reliance on the checks as equivalent to cash. The Cashier's Checks were obtain by Redan and endorsed to Warren Finance at the latter's request precisely because cashier's checks have always been treated in the past as the equivalent of cash. Like thousands of other businesses, Warren Finance relied on cashier's checks as a substitute for cash.

In addition to overlooking the factual circumstances of the instant case, the DCA's rationale for its decision also ignores the general manner in which cashier's checks are obtained for the purpose of endorsement to third parties. **As a** matter of commonly-accepted business practice, buyers and sellers rely on cashier's checks endorsed by the payee to subsequent holders precisely because cashier's checks are not

subject to countermand and therefore constitute a substitute for cash. The use of cashier's checks in the business world is based on the expectation that cashier's checks are equivalent to cash not only when issued but also ~~when endorsed to~~ subsequent endorsees.

A commentator cited by the DCA in its opinion has provided an excellent explanation for such reliance on cashier's checks, as follows:

Occasionally a bank issues a cashier's check in satisfaction of a debt it owes to the check's payee. More often, though, a customer of the issuing bank purchases a cashier's check for its own use. Two separate transactions are usually involved in the latter case. First, the bank in effect sells the check to its customer. Then the customer, referred to as the purchaser, negotiates the check to a third party [emphasis added].

Lawrence, Making Cashier's Checks and Other Bank Checks Cost-Effective, 64 Minn. L. Rev. 275, 285 (1980).

The commentator notes that the use of a cashier's check in this situation satisfies the expectations of the payee as well as the endorsee of the check. In a typical purchase and sale transaction (or as in the instant case, a loan transaction), the seller (or lender) "may not wish to assume the risk of litigation or of insolvency," while the "buyer [or borrower] may not wish to assume the risk of theft or of other loss that accompanies the use of cash. Clearly, this situation calls for a viable cash

substitute that mitigates these risks for both parties." Id. at 280.

These risks are mitigated through the use of cashier's checks. In a typical business closing, in order to maintain control over the funds represented by the cashier's check, the buyer will purchase a cashier's check made out to the buyer as payee, with a view to endorsing the check to the seller at the closing once the buyer is prepared to deliver the funds. Purchasing a cashier's check made out to the buyer rather than seller assures that the seller cannot make use of the check until the buyer is satisfied that all aspects of the transaction have been closed to the buyer's satisfaction, whereupon the buyer endorses the check to the seller.

The **DCA's** ruling that at the payee's request the drawee bank may stop payment on a cashier's check when held by a subsequent endorsee who is not a holder in due course will require far-reaching alterations in customary commercial practice. In many closings, the only way to obtain immediate and final payment on the same basis as heretofore afforded through the use of cashier's checks will be to close with cash, with the attendant inconvenience and risk of theft or other loss. The decision of the **DCA** forecloses the ability of Florida residents to close transactions in reliance on cashier's checks endorsed by

the purchaser/payee, in direct contradiction to the Uniform Commercial Code. If the decision is upheld by this Court, Florida lawyers and their clients will no longer be able to feel comfortable in accepting cashier's checks negotiated by the purchaser/payee when they seek immediate and final payment.

In its Memorandum filed in opposition to Warren Finance's Motion for Rehearing and Rehearing en Banc, Barnett attempted to minimize the effect of the DCA's decision, stating that it "will be applicable in the very unusual situation where the holder of the cashier's check is not a holder in due course because he or she has not taken it for value in good faith, or with knowledge of a defense." Barnett's Opposition to Warren Finance's Motion for Rehearing and Rehearing en Banc at 4. This argument overlooks the fact that participants in commercial transactions seek immediacy and finality of payment through the use of cashier's checks because they do not wish to assume the risk of litigating whether or not they qualify as holders in due course.

Holders in due course do not want to undergo the time and expense of legal challenges to their claimed status as holders in due course even though such challenges ultimately result in a court determination confirming their status as such. It is precisely for this reason that cashier's checks are so widely used in commercial transactions. If cashier's checks are subject

to countermand and therefore are subject to expanded possibilities for litigation, and if during the pendency of litigation, endorsees of dishonored cashier's checks are subject to the risk of insolvency of their endorsers, as occurred in the instant case, the usefulness of cashier's checks will be severely diminished.

It is not difficult to imagine the commercial uncertainty that would result if banks were entitled to dishonor cashier's checks whenever the payee or a subsequent endorsee made it known that it had changed its mind about negotiating the check to the holder. Not being a party to any of the extraneous transactions giving rise to the third party's claims, the bank would have no way of validating the legitimacy of such claims. To allow the bank under such circumstances to dishonor cashier's checks negotiated to endorsees would be to sanction the disruption of financial transactions whenever a payee or endorsee stepped forward to challenge payment, no matter how baseless its claims, and would destroy the predictability of payment of cashier's checks in the hands of endorsees which has rendered them so useful in today's economy.

V. TREATING CASHIER'S CHECKS **AS** THE FUNCTIONAL EQUIVALENT OF CASH FURTHERS THE POLICY OF NEGOTIABILITY UNDERLYING THE UNIFORM COMMERCIAL CODE, CONSISTENT WITH APPELLATE COURT INTERPRETATIONS OF THE CODE IN ALL OTHER JURISDICTIONS.



With the exception of the 20 year-old decision of the Ohio trial court in Leo Syntax, supra, and the DCA's decision in the instant case, cashier's checks have been considered under the Code to be the functional equivalent of cash in the hands of endorsees as well as payees, unlike ordinary checks, which constitute conditional payment. The Uniform Commercial Code, and the overwhelming weight of judicial authority construing the Code throughout the United States, provide that a cashier's check is a direct obligation of the bank issuing it rather than an obligation of the purchaser or payee.

A cashier's check circulates in the commercial world as the equivalent of cash....People accept a cashier's check as a substitute for cash because the bank stands behind it, rather than an individual. In effect, the bank becomes a guarantor of the value of the check and pledges its resources to the payment of the amount represented upon presentation. To allow the bank to stop payment on such an instrument would be inconsistent with the representation it makes in issuing the check. Such a rule would undermine public confidence in the bank and its checks and thereby deprive the cashier's check of the essential incident which makes it useful. People would no longer be willing to accept it as a substitute for cash if they could not be sure that there would be no difficulty in converting it into cash.

National Newark & Essex Bank v. Giordano, supra, at 329 (emphasis added). Accord, e.g., Meador v. Ranchmart State Bank, 213 Kan. 372, 377, 517 P.2d 123, 128 (1973); Wertz v. Richardson, supra;

Swiss Credit Bank v. Virginia National Bank-Fairfax, supra;  
Munson v. American National Bank and Trust Co., supra; Da Silva  
v. Sanders, supra; Abilities, Inc. v. Citibank. N.A., supra.

If the DCA's decision in the instant case is left standing, the cashier's check in Florida will be deprived, in the hands of endorsees, of the essential characteristic which makes it useful. Florida will be the only state whose appellate courts have created a judicial exception under the Code for cashier's checks negotiated to endorsees. This result will subvert the policy of negotiability underlying Article 3 of the Uniform Commercial Code and vitiate the basic purpose underlying the entire Uniform Commercial Code of facilitating "the continued expansion of commercial practices through custom, usage and agreement of the parties" and making "uniform the law among the various jurisdictions." §671.102 Fla. Stat. (1987) (emphasis added).

In his well-reasoned concurring and dissenting opinion in the instant case, Justice Ervin noted as follows:

In my judgment, the better public policy approach would be to advocate use of a cashier's check as a substitute for cash and allow dishonor of cashier's checks in only extremely limited circumstances [none of which is at issue in the instant case]. If this approach were followed, the bank would not be allowed to raise the fraud defense of a third party.

Slip op. at 8-9. (Emphasis added). Justice Ervin therefore dissented from the majority's opinion in denying Warren Finance's Motion for Rehearing, stating that he would affirm the summary judgment entered by the trial court in favor of Warren Finance. Warren Finance respectfully submits that Justice Ervin's view is by far the better reasoned approach.

**VI. THE UTILITY OF CASHIER'S CHECKS SHOULD BE CONFIRMED IN FLORIDA AS IN ALL OTHER JURISDICTIONS: A UNIQUE EXCEPTION APPLICABLE ONLY IN THE STATE OF FLORIDA SHOULD NOT BE CREATED IN ORDER TO PERMIT BARNETT TO SHIFT THE LOSS RESULTING FROM ITS OWN NEGLIGENCE.**

The business community depends on the commercial predictability of the payment of cashier's checks when presented. Thus, with precise and limited exceptions, none of which is applicable in the instant case, the rule under the Uniform Commercial Code as constructed by appellate courts in all other jurisdictions is that a cashier's check may not be countermanded because the bank agrees to honor the draft as presented when it accepts the cashier's check. Acceptance occurs by the very act of issuing and delivering the check drawn on the issuing bank's own funds.

The status of Warren Finance as a holder in due course is not a relevant issue to this action. Warren Finance as endorsee was the undisputed holder of the Cashier's Checks which by definition were accepted for payment upon issuance. The DCA's distinction

between cashier's checks in the hands of a payee versus an endorsee has no basis in either the Uniform Commercial Code or the vast body of case law interpreting the Code. The only authority for the DCA's creation of such a judicial exception is a 20 year-old trial court case decided on the basis of pre-Code precedent.

If the DCA's decision is affirmed, Florida will be unique in interpreting the Code to abolish the utility of cashier's checks in the hands of endorsees as a substitute for currency when immediacy and finality of payment is sought. The decision, if upheld, will subject endorsees of cashier's checks in Florida to the risk of litigation challenging their status as holders in due course and to the risk of bankruptcy of the endorser before the checks can be presented for payment.

Barnett received full consideration for the issuance of the Cashier's Checks and therefore cannot allege failure of consideration or fraud. Barnett **is** not a victim of any scheme by which it was intended that Warren Finance or Redan would profit at Barnett's expense, but instead is a victim of its own failure to utilize its own internal procedures as well as other well-known banking and legal procedures to protect its interests when faced with a dispute over the payment of the Cashier's Checks.

Barnett failed to follow its own operating procedures manual, which required it to obtain an indemnity agreement from Redan prior to canceling payment on the Cashier's Checks and issuing replacement checks to Redan. Likewise, Barnett failed to avail itself of an interpleader action, which is specifically contemplated in Section 673.306, Florida Statutes (1987) (UCC §3-306). The funds transferred to Redan by means of the replacement checks could have been placed with the registry of the court for a judicial determination of the competing claims to such funds between Warren Finance and Redan.

Barnett's attempt to stop payment on its own Cashier's Checks held by Warren Finance is nothing more than an after-the-fact attempt by Barnett to transfer the loss resulting from its own negligence in issuing replacement checks to Redan. Barnett seeks to shift its loss to Warren Finance, which justifiably relied on the Cashier's Checks as actual and final payment.


The value and effectiveness of cashier's checks as a medium of exchange should be upheld by this Court, consistent with the overwhelming weight of authority in other jurisdictions throughout the United States. If the Court upholds the first DCA's creation of a unique exception for cashier's checks in the hands of endorsees, cashier's checks in Florida will no longer have the utility which they enjoy in all other jurisdictions that have enacted identical provisions of the Uniform Commercial Code.

VII. CONCLUSION: THE DECISION OF THE FIRST DISTRICT COURT OF APPEALS SHOULD BE REVERSED AND SUMMARY JUDGMENT REINSTATED IN FAVOR OF WARREN FINANCE.

For the reasons set forth above, Warren Finance respectfully requests that the Court reverse the District Court of Appeals and reinstate the trial court's Order of Summary Judgment in favor of Warren Finance.

Respectfully submitted,

COMMANDER LEGLER WERBER DAWES  
SADLER & HOWELL



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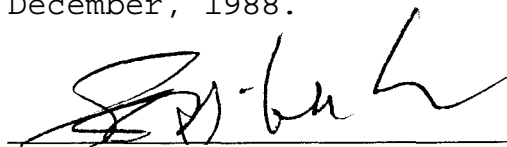
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CERTIFICATE OF SERVICE

I hereby certify that a copy hereof has been furnished by hand delivery to George L. Hudspeth, Esquire, P.O. Box 4099, Jacksonville, Florida 32201 and by hand delivery to James A. Bledsoe, Jr., Esquire, 2501 Independent Square, Jacksonville, Florida 32202, this 27<sup>th</sup> day of December, 1988.

  
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Attorney

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